FOR ARGUMENT

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In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' JOINT REPLY BRIEF

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March 23, 1978

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' JOINT REPLY BRIEF

Petitioners submit this joint brief in reply to the Brief for Respondents the State of Alaska and the Arctic Slope Regional Corporation ("Al. Br.") and the Brief for the Federal Respondents ("Fed. Br.").

INTRODUCTION

Respondents assert that this case concerns "the existence, not the exercise, of the Commission's statutory power." Fed. Br. 19. In their view, the Commission possesses absolute power to suspend any rates that may be filed and may forego the exercise of that power upon such conditions as it pleases, including the

imposition of its own rates. If the Commission may forbid the operation of a pipeline which has been authorized by Congress, however, or if it may establish interim rates for such pipeline without full hearing, and without opportunity for judicial review, then the exercise of such power raises constitutional issues. Congress did not intend to confer such power upon the Commission.

Under the legislative plan, Part I carriers retain the right to initiate their rates. *E.g., United States* v. *Chesapeake & Ohio Railway*, 426 U.S. 500, 511 (1976); *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 384 (1932). After such rates take effect the Commission is empowered under section 15(1) to review them and, if it finds them unreasonable after full hearing, to set them aside and prescribe other rates. It may also award reparations equal to the "full amount of damages" caused by any unlawful exaction, together with interest and attorney's fees.[1]

Section 15(7), the suspension provision enacted in 1910, concerns tariffs which have not yet gone into effect, but which are required to be filed in advance under the procedures adopted in 1906, *i.e.*, because they effect "changes . . . in rates, fares or charges." Section 6(3). Under the 1910 enactment the Commission may exercise powers identical to those granted under section 15(1) whenever such changes in rates are filed, without waiting for them to take effect; in addition, it may defer the effective date of such changes.

The purpose of suspension was to permit maintenance of the status quo pending investigation of changes. It was intended as "a careful accommodation of the various interests involved,"[2] which was fair to the carriers because it allowed

[1] See 49 U.S.C. §§ 8, 16 (1976).

[2] *United States* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP I"), 412 U.S. 669, 697 (1973). *See Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800, 823 (1973).

them to continue operations at rates fixed by themselves. 45 CONG. REC. 4713 (1910) (remarks of Rep. Mann).

In the instant case, however, the Commission has asserted power to suspend an oil pipeline's original rate, even though it held that maintenance of the status quo—deferral of service on the pipeline—was not in the public interest. In order to alter the status quo to suit its wishes, the Commission fixed maximum rates for the suspension period, requiring the carriers to operate on its terms or not at all. It made no attempt to comply with the statutory requirement that it fix rates only after full hearing. If the Commission's rates were fixed too low, the statutory scheme provides no way for the carriers to recoup their losses. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 387-88 (1932).

Respondent Alaska predicts that the Commission's interim rates will be found "on the high side" (Al. Br. 65), but we understand this as a claim that those rates would be high if applied in a subsequent period, after the pipeline had attained operation at full capacity. The Commission itself acknowledged that its rates were not calculated to permit recovery of costs incurred during the suspension period itself, since it "did not consider it suitable to use the throughput level of a short initial period, such as the suspension period," in calculating rates for such a period. 776a-777a.[3] It is uncontroverted that for the period the interim rates were in fact applicable, carriers were forced to operate at a loss. 395a, 650a-652a.

Alaska also suggests that the Commission was entitled to strike down the carriers' tariffs because they were calculated in accordance with "a 1941 consent decree in a proceeding brought by the Department of Justice under the Elkins Act" (Al. Br. 14) rather than "the Commission's past practice in oil-

[3] The Solicitor General has now conceded that petitioners should be permitted to show that the loss involved in startup operations "justifies a somewhat higher rate for early stages of the pipeline's operation." Fed. Br. 57. See Point IV, *infra*.

pipeline ratemaking," Al. Br. 13. This claim is absurd, however, as the Commission's past practice had been to accept, without suspension, pipeline rates that were calculated in accordance with the 1941 Consent Decree to which Alaska refers. The Consent Decree methodology was not discussed in the Commission cases, but it withstood challenge in this Court in 1959. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959).[4]

Alaska now derides the treatment of interest under the Consent Decree methodology as "double dipping," apparently on the theory that it is wrong to allow the pipeline owner a return both on the portion of the pipeline that he has built with equity funds and on the portion he has built with borrowed

[4] Use of the Consent Decree methodology was also recognized in the *President's April 15, 1977 Report to Congress on the Pricing of Alaska North Slope (ANS) Crude Oil* 30-32, *reprinted in* SENATE COMM. ON ENERGY & NATURAL RESOURCES, 95TH CONG., 1ST SESS., ALASKA OIL PRICE POLICY 63-65 (Comm. Print 95-14, 1977); *Anticompetitive Impact of Oil Company Ownership of Petroleum Products Pipelines: Hearings Before the Subcomm. on Small Business Problems of the House Select Comm. on Small Business*, 92d Cong., 2d Sess. 77, 84-89, 94-95 (1972) (remarks of Commission Chairman Stafford and ICC staff). For further recognition of the method, see 684a-690a, 427a-428a, 484a-490a.

The supposed "past practice" to which Alaska refers is a latter-day distillation from two Commission cases which predate World War II and in which treatment of interest was not even mentioned. *Reduced Pipe Line Rates & Gathering Charges*, 243 I.C.C. 115 (1940); *Petroleum Rail Shippers' Ass'n* v. *Alton & Southern R.R.*, 243 I.C.C. 589 (1941). Both were discussed by the Commission in *Petroleum Products, William Brothers Pipe Line Co.*, 355 I.C.C. 479 (1976), *petition for review pending sub nom. Farmers Union Central Exchange* v. *Federal Energy Regulatory Comm'n*, No. 76-2138 (D.C. Cir.), another case in which treatment of interest was not at issue. In *Charge for Terminalling & Storage, Kenai Pipe Line*, I.C.C. Docket No. 36244, initial decision (July 9, 1976), discontinued by Div. 2 on withdrawal of protest (Oct. 19, 1976) (cited Al. Br. 13), an administrative law judge observed that "[a]s far as I have been able to determine the Commission's treatment of interest expense in pipeline cases has never been specifically addressed." *Id.* at 4.

funds. Al. Br. 13. The same argument was advanced without success in *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). Whatever its merits in general, the argument disregards the fact that in this case the carriers' parents were forced to guarantee repayment of 100% of the loans used to build TAPS. The full costs of the pipeline are therefore at the risk of the equity owners, not the lenders, and the owners are entitled to a return on the total. 693a. Even the Commission acknowledged that "there may be merit" to the carriers' views on this point, but for purposes of suspension it resolved the issue against the carriers. 625a.

Respondents imply that any abuse of power in this case is insignificant since there is an "identity of interest" between the owners of the pipeline and the owners of the oil. Al. Br. 6. But there is no such identity. *See* Table, Pet. Br. 6 n.6. If rates are set too low, carriers which own a greater share of the pipeline than their affiliates own of oil must transport competitors' oil at bargain rates. All must transport Alaska's 12-½% of the oil at bargain rates.[5] Alaska itself has calculated that for each penny the TAPS rates are understated, the carriers and their affiliates lose $1 million annually to the State. Al. Br. 7 n.11.

As shown in our principal brief (Pet. Br.) and in the argument which follows, the Commission's order was unlawful and should be set aside.

[5] Respondents assert that it is "misleading" to describe Alaska as owner of 12½% of the oil since it "holds only a royalty interest rather than an equity interest in production." Fed. Br. 8 n. 4. We do not understand the distinction, however, since Alaska's royalty rights authorize it to take either 12½% of the oil in kind or the equivalent value in cash. *See* Pet. Br. 7 n. 8. Alaska reportedly intends to begin taking its oil in kind. *See* Wall St. Journal, Feb. 24, 1978, at 14, col. 3 (Eastern ed.) Whether the royalty is taken in cash or in kind, the economic effect on the carriers and their parents is about the same.

I. THE COMMISSION MAY NOT SUSPEND THE ORIGINAL RATES OF NEW RAILROADS AND PIPELINES.

A. A New Rate Is "New" in Relation to the Old Rate For the Same Service.

Although the starting point in every statutory construction case is "the language itself," respondents err in supposing that analysis in this case may begin and end with the term "new rate."[6] The court of appeals acknowledged that, in the context of the statute, "new" might refer only to the rates that resulted from a change in existing tariffs. 756a. The principal dictionaries agree that "new" may mean "other than the former or old." WEBSTER'S THIRD INTERNATIONAL DICTIONARY, UNABRIDGED 1522 (1971 ed.); OXFORD ENGLISH DICTIONARY 113 (1971); 6 THE CENTURY DICTIONARY AND CYCLOPEDIA 3980 (1911). Respondents argue that new "should be given its ordinary meaning" (Fed. Br. 22), but, as this Court has held, "in its ordinary acceptation, when applied to the same subject or object, [new] is the opposite of old." *Pollard v. Kibbe*, 39 U.S. [14 Pet.] 353, 364 (1840). "[O]rdinarily it is a purely relative term and is employed in contrasting the date, origin, or character of one thing with the corresponding attributes of another thing of the same kind or class." BLACK'S LAW DICTIONARY 1193 (2d ed. 1910 & 4th rev. ed. 1968). In section 15(7) the new rate for a particular service is contrasted with the old rate for that same service.[7]

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[6] See Fed. Br. 21, Al. Br. 31-32, citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

[7] Respondents argue that the original rate for a new service is itself a new rate (Fed. Br. 21), but a rate is merely an attribute of a service. It can only be old or new in relation to the service for which it is charged. If the rate is as old as the service, it is not a new rate.

B. The Changes Which May Be Suspended Under Section 15 (7) Are Those of Which Advance Notice Must Be Given Under Section 6 (3).

The foregoing definition of "new rate" is confirmed by reference to the legislative purpose and "the structure of the statute, . . . the relation, physical and logical, between its several parts." *Duparquet Co. v. Evans*, 297 U.S. 216, 218 (1936). Neither Alaska nor the federal respondents have replied to our argument that sections 6 (3) and 15 (7) are coextensive. See Pet. Br. 20-21. Respondents have acknowledged, however, that the reason for enactment of the suspension provision was to authorize the Commission to initiate a proceeding against a rate believed to be unlawful as soon as advance notice of the rate was received, without waiting for the rate to go into effect. Al. Br. 34. But the Hepburn Act, ch. 3591, § 2, 34 Stat. 584, 586 (1906), required advance notice only of a "change" in rates under section 6 (3). Commencing in 1907 the Commission had called Congress' attention to its lack of power over proposed rate changes. 21 ICC ANN. REP. 9-10 (1907); 22 ICC ANN. REP. 10-12 (1908); 23 ICC ANN. REP. 6-7 (1909). President Taft made clear that the purpose of the suspension legislation he proposed in 1910 was to authorize the Commission to commence proceedings as soon as it received notice of such a change.[8] He emphasized that the suspension power, "if granted,

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[8] 45 CONG. REC. 462 (1910), *reprinted in* H.R. REP. No. 923, 61st Cong., 2d Sess. 3-4 (1910), cited Pet. Br. 18-19. The historical commentator relied upon by respondents confirms this view. 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931), cited Al. Br. 35; Fed. Br. 23. Professor Sharfman notes:

> Without infringing upon the ultimate rights of the carriers to initiate rates and charges, this power enabled the Commission to enter upon the regulating process at an earlier stage than in the usual proceedings upon complaint, and thereby to prevent, at the threshhold, rate changes likely to violate the basic standards of the Act to Regulate Commerce. . . . *The old rates remained in effect till the completion of the Commission's investigation.*

Id. at 201-02 (footnotes omitted, emphasis added).

should be conferred in a very limited and restricted form." 45 CONG. REC. 462 (1910), *reprinted in* H. R. REP. No. 923, 61st Cong., 2d Sess. 4 (1910). Yet respondents claim, in effect, that the Department of Justice draftsmen chose "statutory language [which] is broader than the exigencies of 1910 and 1920." Fed. Br. 27.

To the contrary, the draftsmen carefully limited the schedules which might be suspended to those which had to be filed under section 6(3), since they authorized suspension of a schedule stating a "new . . . regulation or practice" only when it was one "affecting any rate, fare, or charge," and which therefore had to be filed under section 6(3). 49 U.S.C. § 15(7).[9]

The commencement of service on a newly constructed line does not affect existing rates. The rates for such service are established by filing under section 6(1), which imposes no

[9] In the law as enacted, Congress deleted the words "affecting any rate" from section 15(1), making clear that after full hearing the Commission could condemn "any . . . regulation or practice whatsoever," 36 Stat. 551, but Congress declined to make such a deletion from the portion of the bill which became section 15(7). *Compare* ch. 3591, §2, 34 Stat. 586. See H.R. REP. No. 923, 61st Cong., 2d Sess. 10-11 (1910). As Senator Cummins stated in explaining his opposition to such a deletion, "this [suspension provision] is in relation to filing with the Commission in order to prevent any new practice going into effect without the approval of the Commission, and of course the railways now are not compelled to file with the Commission new regulations and practices." *Hearings before the Senate Comm. on Interstate Commerce on S. 3776 and S. 5106*, 61st Cong., 2d Sess. 57 (1910).

advance notice requirement.[10] Since the statute required no advance notice of a new railroad's original rates, it must be inferred that Congress did not wish to give the Commission opportunity or authority to consider whether to suspend such rates before they went into effect.[11] The Commission has no jurisdiction to suspend after a schedule has gone into effect.[12]

[10] Commission regulations pursuant to section 6(6) call for 10 days' notice of the original rates of a newly constructed railroad or oil pipeline. 49 C.F.R. § 1300.57 (1976). This abbreviated period enables Commission staff to review the tariff for conformance with formal requirements (49 U.S.C. §§ 6(6), 6(7)), but does not contemplate protest or substantive review. Respondents note Exxon counsel's earlier statement that the Commission might suspend an initial rate, but this statement was an argumentative response to the State of Alaska's request for initiation of an investigation of TAPS rates some months prior to the filing of tariffs. The suspension power of the Commission was not an issue, and Exxon did not then have the benefit of extensive research on this issue. Exxon Pipeline Company wholly supports petitioners' position that the Commission lacks authority to suspend original rates.

[11] Congress understood that the schedules to be suspended were those filed on 30 days' notice under section 6(3). *See* S. REP. No. 355, 61st Cong., 2d Sess. 9 (1910); 45 CONG. REC. 3466 (1910) (remarks of Sen. Elkins); *id.* at 3472 (Sen. Elkins); *id.* at 4109 (Sen. Root); *id.* at 6500 (Sen. Cummins); *id.* at 6501 (Sens. Jones & Cummins); *id.* at 4711 (Rep. Mann); *id.* at 4833 (Rep. Richardson); *id.* at 5143 (Rep. Russell); *id.* at 5163 (Rep. Hardy); *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives*, 61st Cong., 2d Sess. 441 (1910) (testimony of J.C. Lincoln); *id.* at 174 (testimony of E.B. Pierce). "Any new schedule of rates filed with the commission takes thirty days to go into effect, unless its operation is suspended by the commission. It may be suspended by order of the commission for one hundred and twenty days pending investigation, thus giving a possible one hundred and fifty days before that schedule goes into effect if ordered suspended by the commission." 45 CONG. REC. 5163 (1910) (Rep. Hardy).

[12] *Rates on Lumber—Vicksburg, S. & P. Ry.*, 21 I.C.C. 16, 17 (1911); *Wickwire Steel Co.* v. *New York Cent. & Hudson River R.R.*, 27 I.C.C. 168, 169 (1913).

"New" is used in section 15 (7) in the same sense as in section 6 (3) itself, where it is provided that "the proposed changes shall be shown by printing *new schedules*, or shall be plainly indicated upon *the schedules in force*" (emphasis added). Congress confirmed the sense in which it used "new rate" when it amended section 15 (7) in 1920, using the term "the proposed change of rate, fare [or] charge" in the second sentence as synonymous with the filing of a "schedule stating a new . . . rate, fare or charge." See Pet. Br. 24-26 & n.36.[13]

Respondents argue that the 1910 legislative history "contemplates that the Commission may do what it has done here" (Fed. Br. 15), but not one of the quotations upon which they rely supports this claim.[14]

Indeed, respondents appear to concede that they can find no support for their views in the legislative history, since they assert that application of the statute should not be limited to the

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[13] While the federal respondents are willing to concede that this "authoritative gloss" point may have at least "superficial plausibility" (Fed. Br. 34), they argue that "proposed change of rate" may refer to "a change from no rate to an initial rate." Fed. Br. 35. Such a construction is so strained as not to merit serious consideration.

[14] Thus, Representative Mann did not distinguish between "a schedule 'proposing to change an existing rate' and 'a schedule stating a new rate.' " Fed. Br. 27. See Al. Br. 39. Rather, the full quotation supports our view that sections 6(3) and 15(7) are coextensive, for it shows that Representative Mann used the first phrase—"schedule . . . proposing to change an existing rate"—to summarize the full scope of what might be suspended, and then went on to enumerate the various sorts of changes referred to in the bill—"new rate or classification or regulation or practice." 45 CONG. REC. 4711 (1910). See Al. Br. 39 n.58.

Nor is there any "summary of the bill" which refers in the "disjunctive" to " 'the filing of new rates or changes in old rates.' " Fed. Br. 28. Rather, respondents have taken the latter quotation from a caption in a comparative table which sets out corresponding provisions of the Elkins and Cummins Bills. *Hearings on S. 3776 and S. 5106 Before the Senate Comm. on Interstate Commerce*, 61st Cong., 2d Sess. 15 (1910). The suspension provisions of the two bills reached the same tariff changes, but the Cummins Bill (S. 3776) described them as "schedules . . . changing an existing rate or charge." The caption, which referred to both provisions, described them as "regulating the filing of new rates or changes in old rates" and it is evident that "or" is not used in the disjunctive, but links the equivalent terms of the two bills. It is "used as a word of explanation showing the relationship between the word preceding it and the word following it. In this sense it has the meaning of, 'to-wit,' and gives to the word preceding it the same meaning as that which follows." *Bowles* v. *Weiner*, 6 F.R.D. 540, 542 (E.D. Mich. 1947). *Accord, H. & B. American Mach. Co.* v. *United States*, 11 F. Supp. 48, 53 (Ct. Cl. 1935), *petition for cert. dismissed by stipulation*, 297 U.S. 726 (1936); *Blumenthal* v. *Berkshire Life Ins. Co.*, 134 Mich. 216, 219, 96 N.W. 17, 18 (1903).

evils which Congress perceived in 1910. Fed. Br. 22, 27. The statute is limited, however, by the contemporary purpose[15] and by Congress' understanding that the enactment was "fair" because it would operate only to defer changes. 45 CONG. REC. 4713 (1910) (Rep. Mann).[16] The main purpose of suspension was to guard against "instability of rates and consequent commercial disturbance." *Advances in Rates—Western Case*, 20 I.C.C. 307, 314 (1911).[17] No such disruption occurs when service commences on a new line.

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[15] *See Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395 (1975).

[16] Respondents do not dispute the fact that Congress "linked the carrier's right to maintain an existing rate to the due process requirements of the Constitution" (Pet. Br. 22 & n.29), but emphasize that most of the discussion of this linkage occurred in debate on the Cummins amendment, which would have permitted indefinite suspension of increases. Al. Br. 37 n.57. The remarks reflected an understanding as to the general operation of the Act, however, and the Cummins amendment was defeated as too harsh to the carriers. The same concerns that led to its defeat would have impelled Congress to reject the interpretation which the Commission advocates in this case.

[17] As a representative of shipping interests explained to Congress, "We are not asking for low rates, but for stability of rates and

C. Respondents Misunderstand the Purpose and Significance of the "Initial Schedule" Provisos in Subsequent Suspension Statutes.

Respondents place principal reliance on their claim that subsequent Congresses, which enacted other regulatory statutes, must have understood language like that of section 15(7) to authorize suspension of a carrier's original rates. That claim is based on the use in such statutes of the so-called "grandfather provisos," which forbade suspension of the "initial schedule" of carriers in operation when the acts took effect.[18]

Such a claim is of dubious relevance, at best, since the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). *Accord, United Airlines, Inc. v. McMann*, 98 S. Ct. 444, 449 n.7 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); Pet. Br. 29 n.4.

The argument has no merit here, since respondents appear to have misunderstood the purpose and meaning of the grandfather provisos. The grandfather carriers' initial schedules were not necessarily composed of new rates. Those schedules would have contained both old rates, at which the carriers had been operating before they came under ICC regulation, and new rates, which the carriers might choose to adopt when they filed

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reasonable rates; rates adjusted to our competition; but stability of rates. It is the violent fluctuations that injure the shippers . . . ." *On Bills Affecting Interstate Commerce: Hearings Before the Comm. On Interstate & Foreign Commerce of the House of Representatives*, 61st Cong., 2d Sess. 440 (1910) (testimony of J.C. Lincoln).

[18] 49 U.S.C. § 316(g) (motor carriers), 318(c) (contract carriers) (originally enacted as Motor Carrier Act of 1935, ch. 498, 49 Stat. 558, 561); 49 U.S.C. § 907(g) (Transportation Act of 1940, ch. 722, Tit. II, § 201, 54 Stat. 937) (water carriers); 49 U.S.C. § 1006(e) (ch. 318, § 1, 56 Stat. 288 (1942)) ("initial tariff" of freight forwarders). See Fed. Br. 28-31; Al. Br. 40-46.

their initial schedules.[19] In enacting the grandfather exemption, Congress obviated any claim that an initial schedule could be suspended because it reflected a change from prior practice. Congress apparently recognized that the grandfather carriers would have to adapt their existing rates to the new regime (see Pet. Br. 30 n.43), and it allowed those carriers to file their rates and, indeed, to effect an adjustment of rates without threat of disruption of service.

That Congress did not equate "initial schedules" with "new rates" is conclusively demonstrated by reference to section 218(c) of the Motor Carrier Act, the provision which authorized suspension of the schedules of "contract carriers." Those schedules could be suspended only if they stated a "reduced charge." 49 Stat. 561 (present version codified in 49 U.S.C. §318(c)). The section nonetheless went on to include the identical grandfather clause on which respondents rely, immunizing "initial schedules" from suspension, and plainly giving the contract carriers an opportunity to reduce their rates before filing their initial schedules. *Id.*[20]

Respondents note that in 1938 Congress placed a time limit on the grandfather provisos and argue that thereafter all initial schedules were impliedly subject to suspension. Fed. Br. 29-30; Al. Br. 41-42. But the legislative history shows that the imposition of the time limit in 1938 was to prevent further

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[19] Nearly one hundred thousand motor carriers, subject to regulation in every state but Delaware, were brought under Commission jurisdiction in 1935. *Coordination of Motor Transportation*, 182 I.C.C. 263, 371 (1932).

[20] The principal purpose of contract carrier regulation was to ensure that they charged enough to permit the survival of the common carriers who competed with them. *See ICC* v. *J-T Transport Co.*, 368 U.S. 81, 95-96 (1961) (discussion of purpose of legislation by Frankfurter, J., dissenting).

changes which would be immunized from the suspension power. As Commissioner Eastman explained,

> all of the time our field force is discovering operators who have failed to file their applications or to file their tariffs. When they are brought to time and required to file tariffs under the law, they are now able to take advantage of the fact that all of the other carriers have filed and they can see what their rates are, and there has been a tendency in many cases to file low rates for the purpose of diverting traffic as long as such an advantage can be maintained. Being an initial tariff, we are now unable to suspend.[21]

Remarks of Senator Wheeler, sponsor of the Motor Carrier Act (79 CONG. REC. 5650 (1935)), indicate his view that suspension, even as applied to motor carriers, concerned changes in existing rates. "If [the Commission] does suspend the rate, of course, the rate the carrier has been charging will continue during that period of time. It only suspends the lower rate or the higher rate pending hearing and decision, and the carrier will still go on getting its published rate." 79 CONG. REC. 5656 (1935).[22] Accordingly, the provisos immunizing initial schedules from suspension do not justify respondents' inference that Congress believed the original rate for a new service could

[21] *Hearings on H.R. 9739 Before a Subcommittee of the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 25 (1938). To like effect, see *Hearings on S. 3606 Before a Subcomm. of the Senate Committee on Interstate Commerce*, 75th Cong., 3d Sess. 25 (1938); LETTER FROM THE CHAIRMAN OF THE ICC SUBMITTING A REPORT RECOMMENDING ADDITIONAL LEGISLATION ON MOTOR CARRIERS AND BROKERS, S. Doc. No. 159, 75th Cong., 3d Sess. 8-9 (1938).

[22] The sponsor's views are entitled to "substantial weight." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Nat'l Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967); *Schwegman Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

otherwise be suspended. It is undisputed that other suspension provisions, modeled on section 15(7), confer no authority to suspend a new entrant's original rates.[23]

Whether the Commission could suspend the original rates of a motor carrier, contract carrier, water carrier or freight forwarder was not an important issue because the Commission had power to consider those rates at the time it decided whether to grant a certificate of public convenience and necessity. Respondents suggest that the Interstate Commerce Commission may have no "authority to consider a carrier's initial tariff as part of certification" (Fed. Br. 32), but the relevant acts provide that the Commission may attach to its grant of a permit or certificate "such reasonable terms, conditions and limitations" as the public interest may require. 49 U.S.C. §§ 308(a), 309(b), 909(d), 909(g), 1010(e). During the debate on the Motor Carrier bill, Representative Pearson referred to that language and asked:

> Is it not a fact that under section 209 [49 U.S.C. § 309(b)] the Interstate Commerce Commission could decline to issue a certificate of public convenience and necessity unless the rates submitted by the contract carriers were satisfactory to the Commission. Could that not be done under section 209 of the bill?

79 CONG. REC. 12210 (1935). A spokesman for the committee

[23] See Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1976), and Section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e) (1976). The Solicitor General suggests that FERC may repudiate its predecessor agency's long standing view as to the scope of suspension (Fed. Br. 37 n.22), but the view was long ago accepted by this Court. *See Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U.S. 378, 388-90 (1959). Apparently as a result of statements made in *American Telephone & Telegraph Co.* v. *FCC*, 487 F.2d 865, 873 & n.15 (2d Cir. 1975), the Federal Communications Commission sought and obtained a statutory amendment establishing its right to suspend the rates of new services. Pub. L. 94-376, § 2, 90 Stat. 1080 (1976) (codified in 47 U.S.C. § 204). *See* H.R. Rep. No. 94-1315, 94 Cong., 2d Sess., at 6-7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 1926, 1931 (1976).

which reported the bill, Representative Terry, replied in the affirmative. *Id.* The Court has confirmed that, in licensing contract carriers under the Motor Carrier Act, "the matter of rates is one factor to be weighed in determining the need for the new service." *ICC v. J-T Transport Co.*, 368 U.S. 81, 91 (1961). The Solicitor General acknowledges that "rates are considered at the time of certification" in at least one class of motor carrier cases (Fed. Br. 32 n.19), and there can be no doubt of the Commission's power in this regard, though it may be sparingly exercised in practice.[24]

[24] While it is true, as respondents emphasize (Fed. Br. 32 & n.19; Al. Br. 47 n.69), that the Commission does not affirmatively "approve" a motor carrier's rates when it issues a certificate, the withholding of a certificate may mean that the Commission has disapproved the rates. Alaska asserts that "[u]nder Commission practice a carrier has ninety days *after* a certificate is granted within which to file its proposed initial tariffs" (*id.*), but we believe this to be a misstatement. An applicant who is successful in the initial licensing procedure does not receive the statutory certificate, but is given a 90 day period in which to fulfill various conditions established by the Commission, one of which is that his schedule of rates be placed on file. When the rates are filed, the Commission's rate section approves or rejects the schedule as to form. 49 U.S.C. § 317(a). The Commission may also, in an appropriate case, disapprove the rates themselves, in which case the rates are rejected ("suspended") and the certificate is also withheld. Accordingly, the Commission appears to use concurrent licensing and suspension power when it disapproves the rates of a new carrier. The affidavit of the Commission's Albert H. Fitzgerald appears to confirm that a certificate is granted only after the Commission has tacitly approved the rates by failing to "suspend" them. 715a-716a (references to "suspensions" of "initial rates for authority *to be granted*" (emphasis added)). The Commission also has power to "suspend" a motor carrier's certificate. 49 U.S.C. § 312 (1976).

Since the subsequent suspension statutes were coupled with a broad licensing power, their interpretation sheds no light on the 1910 enactment.[25]

D. Commission Practice Does Not Support Respondents' Construction of the Statute.

Although respondents do not contend that the Commission has ever suspended the original rates of a new railroad or pipeline before entry of its order in this case, they argue that "[t]he Commission has repeatedly interpreted its suspension authority . . . as extending to initial rates." Al. Br. 48. Here again, however, respondents confuse the categories at issue. In Commission terminology, the terms "initial schedule" and "initial rate" refer to the initial filing with the Commission of a rate for a particular service. Such a rate may be the original rate for a somewhat novel service which is itself subject to suspension because it establishes a practice which affects existing rates for related services; or it may be an old rate at which a particular service was performed before any schedule was on file; or a new, increased rate for an old service for which no separate schedule had been on file, as in *Cotton from New Orleans*, 49 I.C.C. 751 (1918), cited Fed. Br. 42; Al. Br. 48-49.[26]

[25] Respondents also overlook the fact that, following enactment of the Motor Carrier Act, the subsequent suspension statutes defined the schedules which might be suspended somewhat more broadly than Congress had done in 1910, by permitting suspension of any schedule stating "a new . . . practice" whether or not it affected an existing rate. 49 U.S.C. § 907(g) (water carriers); 49 U.S.C. § 1006(e) (freight forwarders). In 1940, in the case of contract carriers, Congress explicitly authorized suspension of a "charge for a new service." 49 U.S.C. § 318(c) (ch. 722, Tit. I, § 23, 54 Stat. 925 (1940)).

[26] In *Cotton from New Orleans*, the carrier had failed to file its port-to-port rate for the all-water journey from New Orleans to New York, although the rates for through transport by rail and water from inland points via New Orleans to New York had long been on file. *See Southern Pacific Co. Ownership of Atlantic Steamship Lines*, 43

The results in the Commission cases are consistent with the view that such an initial filing may be suspended under section 15 (7) only if it changes or affects existing rates. *See Rail-Water, Grain in Bulk, Missouri, Illinois & Indiana to Buffalo,* 319 I.C.C. 123, 129, *rev'd as to burden of proof,* 321 I.C.C. 564 (1963) ("The proposed rates are 'initial' in the sense that joint rates for the service have not heretofore been published, but they are 'changed' in the sense that existing charges to shippers for the service are changed.")

Apart from *Cotton from New Orleans,* which concerned an increased rate for an old but previously unfiled service, the Commission's power to suspend was not in issue and was not discussed in the subsequent cases on which respondents rely. The question instead was whether the carrier had the burden of proving the reasonableness of his proposed rate or practice in the subsequent investigation and hearing.[27]

In all three of the section 15 (7) cases upon which respondents rely, the Commission appears to have exercised authority to suspend an initial filing because it changed pre-

I.C.C. 168, 179 (1917). When the Commission ordered the carrier to file the port-to-port rates, the carrier took the occasion to increase all the rates, and the Commission suspended. The Commission noted that the port-to-port rates were "new rates in the sense that respondent had not previously filed its port-to-port rates with the Commission," 49 I.C.C. at 752, but they were also new, increased rates for an old service, and there could be no doubt of the Commission's authority to suspend.

[27] As enacted in 1910, section 15(7) imposed on the carrier the burden of proving the reasonableness of an "increased rate" in an investigation, but the Commission limited this to an increase in rates previously on file. This in effect relieved the carrier of the burden of proving the reasonableness of its initial filing in respect of a particular service, even if it reflected an increase, as in *Cotton From New Orleans, supra.* In the Transportation Act of 1940 Congress amended the statute to impose the burden of proof on the carrier in respect of any "proposed changed rate, fare, charge, classification, rule, regulation or practice." Transportation Act of 1940, ch. 722, § 10(c), 54 Stat. 912.

viously unfiled rates[28] or because it inaugurated a new practice — a somewhat novel service—which affected the rates for existing services.[29] The cases under the Motor Carrier Act are not relevant because the Commission had concurrent power to withhold a certificate at the same time that it "suspended" the rates.[30] Since the basis for suspension is not discussed in these cases, the Commission's action in suspending is no more than the "unexplained exercise of supposed authority," which is entitled to no weight. *Adamo Wrecking Co. v. United States,* 98 S. Ct. 566, 574 n.5 (1978).

The agency's interpretation "carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings". *Zuber v. Allen,* 396 U. S. 168, 192 (1969).[31] The interpretation which

The Commission, however, has continued to relieve the carrier from the burden of proving the reasonableness of its initial filings for new services, even though it is apparent that the Commission has power to suspend those filings under section 15(7) only because they change or affect the rates for existing services. Commission interpretation of the burden of proof requirement furnishes no guidance in the present context. An equitable decision to relieve carriers from such a burden in respect to initial filings may not be translated, by reverse alchemy, into the conclusion that all initial filings may be suspended.

[28] *Cotton from New Orleans, supra.*

[29] *Rail-Water, Grain in Bulk, Missouri, Illinois & Indiana to Buffalo,* 321 I.C.C. 564, *reversing* 319 I.C.C. 123 (1963) (carriers with prior separate tariffs filed joint "initial tariff" stating lower rates for new combined service over same route); *Bituminous Coal Via Motor-Rail from Lynnville, Ind., to Chicago, Ill.,* 313 I.C.C. 573 (1961) (established carriers filed "initial" joint rate for through transport of coal) (suspension under §§ 15(7), 216(g)).

[30] See the remaining Commission motor carrier cases cited Fed. Br. 43 n. 28; Al. Br. 51 & n. 74.

[31] Generally, the agency's interpretation is entitled to deference only when it is contemporaneous with enactment of the statute,

Chairman Knapp advanced to Congress in 1910 was that suspension would not deny the carriers their right to initiate rates since "[t]hey had a rate before they filed the new tariff."[32] Commissioner Clements also expressed the view that suspension "is simply holding that rate then made in statu quo, and when they ask to increase it asking the reason for it." *Id.* at 1271, quoted Pet. Br. 26 n.37. The Commission described the scope of the law in its Annual Report for 1911, noting that

> [o]ne of the important additions by the Mann-Elkins Act of 1910 is the authority conferred upon the commission to suspend the operation of proposed changes in rate schedules until the propriety and reasonableness thereof may be investigated.

25 I.C.C. ANN. REP. (1911). *See* 24 I.C.C. ANN. REP. 1 (1910). The Commission's regulations also reflect this traditional view.[33]

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longstanding and consistent with the congressional purpose. *See, e.g., Batterton v. Francis,* 97 S. Ct. 2399, 2405 & n. 9 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-42 (1976); *Morton v. Ruiz,* 415 U.S. 199, 237 (1974); *FMC v. Seatrain Lines, Inc.,* 411 U.S. 726, 745-46 (1973); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

[32] *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 1211 (1910), quoted Pet. Br. 21.

[33] Respondents avoid discussion of regulations as indicia of Commission construction. See Pet. Br. 27. Those which use the term "new" to distinguish a rate, tariff, practice or other item from those which they replace include 49 C.F.R. §§ 1300.9(k)(9)(1976) ("new tariff . . . prior tariff"); 1300.54 ("new rates" synonymous with "change in rates"); 1300.9(h)(1) ("new tariff . . . former tariff" and "new tariff . . . old tariff"). *See also* 49 C.F.R. §§ 1300.9(i), 1300.22, 1300.31(c)(8). In contrast, when the Commission addresses rates or items which are not changes or replacements it chooses instead such terms as "original" (49 C.F.R. §§ 1300.9(k)(10), 1300.11) or "established in the first instance" (§ 1300.57). *See* 49 C.F.R. § 1303.26(b) ("first fare"). *See also* 49 C.F.R. § 1300.9(k)(1) ("the schedules which were to be changed by the suspended publication . . . will remain in effect and will not be changed so long as the effectiveness of the suspended matter is deferred").

II. EVEN WHERE THE COMMISSION MAY SUSPEND A RATE, IT MAY NOT SUSPEND FOR UNLAWFUL PURPOSES.

The suspension power may only be exercised in accordance with the statutory purpose to maintain the status quo of transportation pending an investigation.[34] If the Commission may suspend a new line's original rate, it may only do so upon a finding that it is preferable in the public interest to defer the commencement of service on the new line, rather than to allow service to commence at the carrier's original rates. Pet. Br. 32-33.

Respondents argue that, despite the legislative history, the 1910 enactment must authorize suspension for other reasons than to preserve the status quo, since "[t]hat is exactly what Congress intended when it provided for the suspension of 'new' rates—including initial rates—filed by motor carriers, water carriers and freight forwarders." Al. Br. 43; see Fed. Br. 40-41. We have already shown, however, that respondents misunderstood the relevant provisions of those other statutes. In contrast to a licensing decision under those other enactments, suspension under section 15(7) presents a narrow issue—whether to preserve the status quo pending investigation.[35]

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[34] *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d. Sess. 1271 (1910) (Commissioner Clements). *See* Pet. Br. 32-33 & n.48.

[35] The Court has compared a rate suspension to a preliminary injunction (*United States* v. *Chesapeake & Ohio Ry.,* 426 U.S. 500, 513 (1976)), and it is black-letter law that the purpose of such an injunction is to preserve the status quo. *E.g., District 50, UMW* v. *International Union, UMW,* 412 F.2d 165, 168 (D.C. Cir. 1969); *American Radio Ass'n* v. *Mobile Steamship Ass'n,* 483 F.2d. 1, 4 (5th Cir. 1973); *Tanner Motor Livery, Ltd.* v. *Avis, Inc.,* 316 F.2d 804, 808-09 (9th Cir.), *cert. denied,* 375 U.S. 821 (1963); *Blaylock* v. *Cheker Oil Co.,* 547 F.2d. 962, 965 (6th Cir. 1976). As respondents recognize, however (Fed. Br. 55), the Commission's suspension

Suspensions which are "aimed at coercing behavior rather than merely preserving the status quo pending investigation" are a "sham" and constitute an abuse of authority.[36] In the instant case the Commission held that maintenance of the status quo was *not* in the public interest, that it would be "contrary to the interests of all concerned" to defer the commencement of service on the Trans Alaska Pipeline.[37] 629a. But it suspended the original rates anyway, in the belief that it could thereby alter the status quo and compel the carriers to supply service during the suspension period at a rate initiated by the Commission.

The suggestion that, upon suspension, carriers may yield to coercion by refiling tariffs with rates as dictated by the Commission, cannot make an otherwise unlawful suspension proper. Fed. Br. 41. The validity of a suspension order depends upon the propriety of the Commission's actions, not upon any subsequent acts of the carriers. If the Commission may suspend an original rate, it may do so only for the purposes authorized by Congress. *E.g., Local 357, International Brotherhood of*

power is narrower than the injunctive power of the Judiciary. Congress authorized suspension only as "an emergency measure to preserve the *status quo.*" *Vulcan Detinning Co.* v. *New York Central R.R.*, 203 I.C.C. 260, 261 (1934).

[36] *Continental Airlines, Inc.* v. *Civil Aeronautics Board*, 522 F.2d 122, 129 (D.C. Cir. 1975) (*en banc*); *see Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 543 F.2d 247 (D.C. Cir. 1976).

[37] No one disputes the validity of that Commission conclusion. Preservation of the status quo would have imposed tremendous losses on the TAPS carriers and on shippers, as well as some loss to the State of Alaska (through deferral of tax revenues and royalties) and the Arctic Slope Regional Corporation (through deferral of its share of the State's revenues). And Congress has declared that "[t]he earliest possible construction" of TAPS and "early delivery of oil and gas from Alaska's North Slope" is in "the national interest." 43 U.S.C. § 1651 (1976) *See* Pet. Br. 5.

Teamsters v. NLRB, 365 U.S. 667, 676-77 (1961). Since the agency exercised its power for an unlawful purpose, its suspension order must be set aside.[38]

III. THE COMMISSION UNLAWFULLY PRESCRIBED INTERIM RATES WITHOUT A FULL HEARING.

Respondents' assertion that the Commission did not unlawfully prescribe rates (Al. Br. 53-54; Fed. Br. 45-46) cannot withstand even cursory examination. As the respondents concede (Al. Br. 18; Fed. Br. 48), the Act specifically empowers the Commission to set rates only after a full hearing, upon a finding that the rates established by the carrier are "unjust or unreasonable . . . or otherwise in violation of [the Act]." 49 U.S.C. § 15(1); 49 C.F.R. § 1300.56 (1976).

The Commission's order under review is a ratemaking order. Respondents' argument to the contrary rests on their contention that because, in theory, the Commission gave the carriers a choice between charging the specified rates or declining to operate at all, its order was mere advice. That argument ignores the nature of Commission regulation over oil pipelines. An oil pipeline faced with a Commission ratemaking order always has the choice of charging the rate specified by the

[38] Respondents concede that a suspension decision is reviewable to determine whether the Commission exceeded its statutory authority. Al. Br. 31; Fed. Br. 19 n.11. *See Phillips Petroleum Co.* v. *Federal Power Commision*, 227 F.2d 470 (10th Cir. 1955). Whatever may be the standard of review when the Commission has purported to apply the statutory criteria, nothing in this Court's decisions in *United States* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP I"), 412 U.S. 669 (1973), or *Arrow Transportation Co.* v. *Southern Railway*, 372 U.S. 658 (1963), precludes review when the agency does not even purport to apply the statutory test of preservation of the status quo. *See Leedom* v. *Kyne*, 358 U.S. 184 (1958). *See also* Pet. Br. 34 n.50.

Commission or declining to operate.[39] The existence of this "option" does not make the Commission's order any less a ratemaking order in legal effect, in purpose or in economic reality.

Respondents do not, and indeed cannot, suggest that the hearing prerequisites imposed by the Act have been satisfied in this case. Rather, respondents seek to justify the Commission's action as a beneficent gesture, affording the carriers an alternative to other proposed courses: (1) an outright seven-month bar to any operations or (2) repetitive filings designed to find a rate that the Commission would approve. Petitioners agree that neither of those alternatives presented acceptable options. As the rates here involved a newly constructed pipeline, the carriers did not have the usual protection of existing rates during the suspension period. The cessation of pipeline operations for the suspension period would have caused irreparable injury to all concerned. Cancellation of the carriers' original schedules and filing of new schedules, the only alternative under the Commission's rules,[40] would require the carriers to waive their right to secure a hearing with respect to the reasonableness of the rates originally filed.

The Commission's action ignores the central philosophy underlying section 15(1), which establishes that carriers are entitled to rates of their own making or rates set by the

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[39] Section 1a of the Interstate Commerce Act requires prior approval only when a "carrier by railroad" seeks to discontinue its operations. 49 U.S.C. § 1a. Unlike a railroad or public utility, an oil pipeline is always free to cease operation. No prior government permission or abandonment application is required. This Court held at an early date that ". . . while the amendment [subjecting pipelines to the Interstate Commerce Act] does not compel them to continue in operation . . . it does require them not to continue except as common carriers." *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914).

[40] See 49 C.F.R. § 1300.11 (1976), ICC Special Permission No. 76-2730 (February 13, 1976).

Commission in accordance with the statutory prerequisites. That philosophy has been explicitly and repeatedly recognized by this Court. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 384 (1932); *Atchison, Topeka & Santa Fe Railway v. United States*, 284 U.S. 248, 262 (1932); *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 277 U.S. 88, 93 (1913). As the Court of Appeals stated in *Arizona Grocery*, 49 F.2d 563, 566 (9th Cir. 1931), *aff'd*, 284 U.S. 370 (1932):

> The statute does not authorize or suggest the imposition of tentative rates pending an investigation or of rates *pendente lite* in an investigation.

Thus, the question is not merely whether carriers may be forced to operate at rates other than those they would "prefer" (Al. Br. 54, n. 77), but whether they are entitled to operate under rates established in accordance with the Act.

Like the majority below, respondents seek to avoid the statute through reliance upon the Court's decision in *United States v. Chesapeake & Ohio Railway ("Chessie")*, 426 U.S. 500 (1976). Specifically, respondents claim that the Commission's prescription of rates here is analogous to the Commission's action in *Chessie*, where the railroads were required to devote a portion of the increased revenues sought to the particular purpose which the railroads contended justified the rate increase. 426 U.S. at 515. See Al. Br. 55-56; Fed. Br. 47-49.

The attempt of respondents and the court below to extend the limited holding of the *Chessie* decision beyond its clear meaning should be flatly rejected. This Court confined *Chessie* to the specific question before it (426 U.S. at 509-10):

> The precise question presented in this case, while one of first impression in this Court, is also a narrow one . . . . We are confronted with the question of whether the Commission may, as a condition for not suspending and subsequently investigating the

> lawfulness of a proposed tariff, require the railroads to devote the additional revenues to a need which, they allege, justifies the increase.[41]

The *Chessie* case did not involve the Commission's authority to prescribe *rates* without a full hearing. This Court held only that the requirement that a carrier use revenues from increased rates for the very purposes advanced by the carrier to justify those rates was "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend [increased] rates." 426 U.S. at 514. The attempt to apply that holding to the Commission's statutorily-prohibited prescription of interim rates in this proceeding carries the *Chessie* decision far beyond its carefully defined boundaries.

Similarly, respondents' interpretation of *Chessie* as overruling *Moss v. Civil Aeronautics Board*, 430 F.2d 891 (D.C. Cir. 1970) (Fed. Br. 49), must be rejected. In *Moss* as in this proceeding, a regulatory commission, after oral argument, (1) suspended the rates proposed by carriers, (2) outlined its own rate formula and (3) announced its decision to "permit tariff filings implementing" that formula to take effect without suspension. 430 F.2d at 894-95. The Court of Appeals for the

[41] The *Chessie* case did not raise any issue with respect to the Commission's power to suspend the increased rates involved in that proceeding. The parties in *Chessie*, including the Interstate Commerce Commission, presented the issue in very narrow terms: "whether the Commission has the power to issue such orders [simply holding the railroads to their word], as a condition of not suspending proposed rate increases"; "The Commission has not asserted a broad power over management decisions; the decision regarding why and for what purpose additional funds are required was made by the railroads themselves. It has simply held the railroads to their word." Brief for Appellants United States and Interstate Commerce Commission, Case No. 75-420, filed January 7, 1976, at 2, 40.

District of Columbia Circuit disagreed with the agency's contention that it had only "suggested" rates, concluding that

> [a]s a practical matter, the Board's order amounted to a prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible.
> *Id.* at 898.

The controlling factor in *Moss* was not that *ex parte* meetings had taken place between the agency and the regulated industry (Al. Br. 57; Fed. Br. 49), but that an agency had attempted to prescribe rates without the requisite full hearing, and to use its suspension authority to shield its prescription from the judicial review provided by Congress. *See Continental Air Lines, Inc. v. Civil Aeronautics Board*, 522 F.2d 107, *vacated and reinstated in part on rehearing en banc*, 522 F.2d 122 (D.C. Cir. 1975).[42]

[42] Although the court *en banc* decided it need not have reached the issue, we believe the original panel in *Continental Air Lines* was sound in its interpretation of *Moss*. As the panel makes clear, the principles underlying *Moss* are unmistakably applicable here:

> [T]he Board orders challenged here are not a legitimate exercise of its discretionary suspension power. Here, the Board through selective application of its suspension authority attempted to coerce petitioner to conform to its preferences as to aircraft accommodations.
>
> The suspension order, therefore, is a sham, designed to implement a policy and assertion of authority outside the Board's statutory power. The Board cannot be allowed to cloak actions outside its authority in the guise of suspension orders and thus insulate them from judicial review and control. To shield such orders from review would allow the Board to "become a monster which rules with no practical limits on its discretion" .... Hence this case is similar to *Moss* v. *CAB, supra*, where we held that a suspension order, which in reality established rates without the proper procedures was subject to review. 522 F.2d at 121 (citations omitted).

It is inconceivable that this Court intended *sub silentio* to repudiate the sound principles underlying *Moss* when it decided *Chessie*.

The coercive economic effect of the Commission's order is beyond dispute.[43] It is obvious that the Commission's action was intended to force the carriers to file the specified interim rates, and that the Commission expected the carriers to do so. The Commission would not have suspended the filed rates if it had thought there was a likelihood that no interim rates would be filed and that the pipeline would be shut down. As Judge Roney said in the dissent below:

> This is ratemaking. We should not hide from that fact . . . . The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the [pipeline companies].
> 762a, 557 F.2d at 802.

Since the Commission's ratemaking order prescribing interim rates was entered without the full hearing required by section 15(1), it was unlawful.

IV. THE REFUND CONDITION IMPOSED BY THE COMMISSION IS UNLAWFUL.

Petitioners contend that they are entitled to have their liability to repay shippers for any charges ultimately found to be excessive determined under the statutory standard for reparations. In responding to petitioners' arguments regarding the legality of the refund provision, the federal respondents have conceded that the refund provision adopted by the

[43] In contrast, the Commission's order in *Chessie* was not coercive since it merely required a modification of the tariff to include a commitment the carriers had already made in their tariff applications. Thus, the carriers were only required to formalize a decision which they had already made concerning use of the funds collected under the tariff.

Commission is materially different from the reparations standard. Fed. Br. 56. The refund condition, by its terms, measures the liability imposed on the carriers as the difference between the filed rate and the rate ultimately approved by the Commission for the future; reparations are measured by the damages incurred by the shipper, *i.e.*, the differences between the rate collected and a just and reasonable rate at the time of shipment. With respect to the suspension period in this case, this difference may be substantial.[44]

Apparently believing that use of an unlawful standard threatened the validity of the refund provision, the Federal respondents state that the refund obligation imposed by the Commission will be interpreted so that refunds need not be calculated solely by reference to the rate ultimately prescribed for the future. Rather, they now suggest that, upon a proper showing by petitioners, any obligation may be calculated by reference to the "possibly different rate level that may have been just and reasonable during the present stages of the pipeline operation." Fed. Br. 56.[45]

This concession, assuming it is binding upon the federal respondents, does not remedy the fundamental objection to the Commission's action.[46] Section 15(7) expressly limits the au-

[44] On denial of rehearing, three dissenting Commissioners expressed the view that "[i]n light of circumstances" related to the start-up costs of the pipeline, the carriers "should be allowed an increase of 42 cents per barrel in the interim levels." 781a.

[45] By adopting this interpretation of the refund provision, the federal respondents necessarily imply that petitioners will have an appropriate forum in which to make such a showing. It is unclear, however, whether respondents are contending that the burden of proof would shift to petitioners under respondents' theory. Such a shift of the burden of proof would deprive petitioners of their statutory rights.

[46] The federal respondents' concession that higher rates might have been justified during the early operating period has come too late to remedy any loss suffered by the carriers from Aug. 1 through Oct. 20, 1978, when the Commission's interim rates were in effect.

thority to order refunds to "a proposed *increased* rate or charge" (emphasis added). Therefore, *any* refund provision imposed with respect to original or reduced, interim tariffs, regardless of content, is unlawful. The Commission itself recognized this statutory limitation and expressed doubts as to the propriety of its action, but proceeded nonetheless to order refunds. Pet. Br. 43. Similar doubts were expressed by the court of appeals, although it upheld the Commission's action. *Id.* To prevent further expansion of powers expressly limited by Congress, this Court must establish that such action, taken in contravention of the statute, will not be sustained. Eleventh-hour speculative concessions should not be allowed to obscure the fact that, by ordering refunds in this case, the Commission exceeded its statutory authority.

CONCLUSION

For the reasons set forth above and in our principal brief, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed and the order of the Interstate Commerce Commission should be set aside.

Respectfully submitted,

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